

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

FILED BY CLERK

APR 12 2007

COURT OF APPEALS  
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	
Respondent,	)	2 CA-CR 2006-0132-PR
	)	DEPARTMENT A
v.	)	
	)	<u>MEMORANDUM DECISION</u>
JIMMIE LYNN LUCAS,	)	Not for Publication
	)	Rule 111, Rules of
Petitioner.	)	the Supreme Court
	)	

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PETITION FOR REVIEW FROM THE SUPERIOR COURT OF MARICOPA COUNTY

Cause No. CR-0158861

Honorable Jeffrey S. Cates, Judge  
Honorable Michael O. Wilkinson, Judge

REVIEW GRANTED; RELIEF GRANTED AND REMANDED

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Jimmie Lynn Lucas

Florence  
In Propria Persona

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H O W A R D, Presiding Judge.

¶1 After a 1987 jury trial, petitioner Jimmie Lynn Lucas was convicted of first-degree burglary and three counts of first-degree murder. He was sentenced to concurrent prison terms of ten years for the burglary and life for the murders. The supreme court transferred Lucas's appeal to Division One of this court, which initially affirmed the

convictions and sentences. *State v. Lucas*, 164 Ariz. 540, 542, 554, 794 P.2d 1353, 1355, 1367 (App. 1990). But Division One ultimately recalled its mandate, *State v. Lucas*, 165 Ariz. 546, 547, 799 P.2d 887, 888 (App. 1990); vacated its opinion; and ordered that Lucas be permitted another appeal. *State v. Lucas*, 168 Ariz. 443, 814 P.2d 784 (App. 1991). Thereafter, the case was transferred to this court. Because no opening brief was ever filed, we dismissed the appeal, which had been stayed for extended periods of time while Lucas sought post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., 17 A.R.S. *State v. Lucas*, No. 2 CA-CR 1991-0856 (memorandum decision filed Jan. 15, 2004). Lucas also sought relief by special action. In this petition for review, filed in propria persona, Lucas challenges the trial court's order dismissing what appears to be his third post-conviction proceeding.

¶2 Lucas filed a notice of post-conviction relief on February 8, 2005. Among its reasons for dismissing the notice, the trial court found the notice was untimely. But Lucas has raised at least a colorable claim that the notice appears to have been timely filed. This court issued its mandate on appeal on January 5, 2005. The notice had to be filed by February 4, 2005. *See* Ariz. R. Crim. P. 32.4(a). Lucas claims he delivered the notice to prison authorities for mailing on February 3, 2005, offering to provide the court with prison logs to support this assertion. *See State v. Rosario*, 195 Ariz. 264, ¶ 10, 987 P.2d 226, 228 (App. 1999) (notice of post-conviction relief deemed filed when given to prison officials).

We think the court abused its discretion in dismissing the notice and denying Lucas's motion for rehearing.

¶3 Additionally, the trial court ruled on the substance of arguments Lucas had set forth in some detail in his notice, without giving Lucas the opportunity to file a petition for post-conviction relief. In its minute entry of April 22, 2005, the trial court referred alternatively to a notice and a petition. By not permitting Lucas to file a petition and denying the motion for rehearing in which Lucas raised this argument, the trial court abused its discretion. *See State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990) (trial court's ruling on post-conviction petition will not be disturbed absent abuse of discretion).

¶4 Addressing the merits of the claims Lucas had identified, the court faulted him for not providing sufficient support for some of them. For example, the court rejected Lucas's claim of ineffective assistance of counsel based on *State v. Donald*, 198 Ariz. 406, 10 P.3d 1193 (App. 2000). The court stated, "Defendant does not demonstrate or in any way support any deficient performance on the part of counsel or prejudice to himself. There is no supporting documentation or statement by anyone . . . . There is no documentation provided of any plea offered, nor documentation that any plea offer was ever made." Additionally, the court stated, "This is not a *Donald*-type matter of interpretation or explanation of an existing factor . . . ." While Lucas may ultimately be unable to sustain his burden of establishing grounds for relief under Rule 32 and avoid the preclusive effect of Rule 32.2, given the contents of his notice, the trial court erred by dismissing it without

permitting Lucas to file a petition. *See State v. Rosales*, 205 Ariz. 86, ¶¶ 1, 7-11, 66 P.3d 1263, 1264, 1266-67 (App. 2003) (finding trial court abused discretion in dismissing post-conviction proceeding before filing of petition, where notice timely, not premature, sufficiently specific, and not subject to summary dismissal as successive).

¶5 The petition for review is granted. Because this court finds the trial court abused its discretion, *see Watton*, 164 Ariz. at 325, 793 P.2d at 82, we grant relief, vacate the trial court's order dismissing the notice of post-conviction relief, and remand this matter to the trial court for further proceedings consistent with this decision.

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JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

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JOHN PELANDER, Chief Judge

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GARYE L. VÁSQUEZ, Judge